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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 630

CHARLES C. HOBART, DOING BUSINESS AS THE HOBART CABINET COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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To the Supreme Court of the United States and the Honorable Judges Thereof:

The Petitioner, Charles C. Hobart, doing business as The Hobart Cabinet Company, respectfully prays this Honorable Court for a Writ of Certiorari to the United States District Court of Appeals, for the Sixth Circuit, for the reasons hereinafter set out.

Proceedings in the Case.

On the 19th day of March, 1940, a complaint was filed with the National Labor Relations Board against Charles

C. Hobart, doing business as the Hobart Cabinet Company, Troy, Ohio, the petitioner, charging him with unfair labor practices toward his employees, within the meaning of Section 8, Subdivision (1) and Section 2, Subdivisions (6) and (7) of said Act (Complaint, Exhibit 1-H, R. 9-10).

March 29th, 1940, Charles C. Hobart filed his answer, denying that he had been guilty of unfair labor practices, as charged, and asking that the complaint be dismissed (Exhibit 1-C, R. 19-26).

Notice of hearing on the complaint was duly issued and served (R. 11) and pursuant thereto the matter was heard before Martin Raphael, Trial Examiner, at Troy, Ohio, April 19, 1940 (R. 63-141).

At the close of the testimony introduced in behalf of the Board, Charles C. Hobart, then respondent, interposed a motion to dismiss the complaint for the reasons therein set out (R. 28). The motion was renewed at the close of all the testimony. The Trial Examiner in his Intermediate Report overruled this motion (R. 33).

The Trial Examiner in the Intermediate Report (R. 31 to 43, inclusive) upon his findings of fact and conclusions of law, found that Charles C. Hobart was guilty of unfair labor practices as charged; recommended that he be required to cease and desist therefrom and post notice in his plant, for sixty (60) consecutive days, stating that he would cease from:

> "In any manner interfering with, restraining, or coercing his employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act" (R. 44).

After consideration of the record and the exceptions, the Board affirmed the findings of the Trial Examiner, found

Charles C. Hobart guilty of unfair labor practices, in the particulars specified in its decision, and ordered him to cease and desist therefrom and post a notice accordingly (R. 46).

Charles C. Hobart thereupon effected his appeal to the United States District Court of Appeals for the Sixth Circuit. Upon hearing, the appeal was denied and the finding of the National Labor Relations Board affirmed, May 8, 1941. Charles C. Hobart then filed a petition for rehearing, which was denied on June 25, 1941.

Statement of Facts.

Charles C. Hobart the petitioner, is an individual doing business as Hobart Cabinet Co. His plant is located at Troy, Ohio, where he is engaged in the manufacture and sale of filing cabinets, desks, stock storage equipment and other articles. During the year 1939, respondent purchased raw materials valued at $250,000. Of this amount, about 12 per cent was secured from without the State of Ohio. During the same period, respondent sold finished products valued at approximately $776,730, of which approximately 87.9 per cent were shipped to points outside the State of Ohio. Approximately 93 per cent of said products were shipped F.O.B. Troy, Ohio (R. 69).

In December 1939, several of petitioner's employees manifested a desire to engage in collective bargaining. One of them, Harry Keyton, prepared a petition in their behalf (Board Exhibit No. 2, R. 26) bearing the following heading:

> "We, the undersigned employees of the Hobart Cabinet Co., 111 S. Water Street, Troy, Ohio, do hereby sign this petition of our own free will to organize for the purpose of Collective Bargaining as a group as defined under the labor laws of the United States."

At various times between December 26, 1939, and the third week of January, 1940, employees Yenger, Cruikshank, Carey and Schurr obtained signatures thereto from their fellow employees in the plant (R. 89, 90 and 99).

On or about December 28 or 29, Hobart, then on vacation in Florida, received a telephone call from his wife in Troy. She told him that Superintendent Wright thought he should be notified of a certain restlessness in the plant and conditions there. The next day, Hobart telephoned Wright. In the course of this conversation, Wright told Hobart that the men were gathering in the plant in groups; that the dissatisfaction was caused by something in connection with the Christmas bonus. Asked whether Wright said anything about unions, Hobart testified that it was his impression that he did not, although he admitted that Wright might have mentioned unions (R. 135 to 138).

January 5, 1940, Hobart returned to Troy from Florida. Directly upon his return, he proceeded to interview, individually, virtually all of his 130 employees. His purpose in doing so was to learn more about the unrest and dissatisfaction concerning which he had heard several accounts.

Lester Williams was one of the first men to be called into Hobart's office. This occurred promptly on Hobart's return, Friday, January 5, 1940. According to Williams' testimony, Hobart asked him why "the trouble was brewing in the shop". Williams testified that it was "because wages were too low to make a fair living." Hobart, during the conversation, explained that a raise in wages would necessitate raising the price of cabinets; that if his price for cabinets were higher than his competitors', fewer cabinets would be manufactured, thus diminishing employment (R. 79). During the conversation, Hobart said, regarding union organization, according to Williams, that he did not like to see it, but that if they did he would have to deal with them, there being nothing he could do about it (R. 86).

Hobart also stated to Williams that if the men wanted to organize it was their own affair, and their legal right to do so (R. 83, 121). He also told Williams he understood that Dale Yenger had circulated a paper among the fellows that worked around him, and that he (Hobart) would "rather deal with the fellows direct instead of having collective bargaining" (R. 80, 130).

According to Hobart's version of his talk with Williams, he told Williams that there had been some unrest and that he wanted to know if Williams had anything to "complain of himself or if there was anything I could do to explain wage conditions or anything in general that I could explain to him." At this point, Hobart testified "he (Williams) spoke immediately about, as near as I remember, about the fact that some of the boys, as he said, were going to organize. I didn't ask him that especially, but that was the explanation that he volunteered" (R. 121). After stating that the men had a right to organize, Hobart told Williams that the only possible difficulty he could see with collective bargaining was that there might be an increase in costs, which might adversely affect his ability to compete in the trade and mean less employment. Hobart then mentioned, among other things, that he would take care of some of the men during the summer slump by using them in his orchard instead of the plant, (a custom Hobart had followed for two years) (R. 122).

Between January 5 and January 20, Hobart interviewed, individually, almost all of his 130 employees. The precise content of each of these conversations is not disclosed in the record. Among those called into Hobart's office, besides Williams, were employees Campbell, Braswell, Carey, Yenger and Cruikshank. At the hearing before the Trial Examiner, they testified for the Board. The substance of their testimony was to the effect that Hobart said to them

that competitive conditions disabled him from granting wage increases. The week following January 5, 1940, Hobart raised the wages of virtually all his employees (R. 122, 123).

On February 13, 1940, several of Hobart's employees arranged with Coleman Claherty, a representative of the American Federation of Labor, to apply for a charter. At the same time, Claherty gave them membership application cards (Board's Exhibit No. 4) (R. 89, 90, 96). During the morning of February 14, these cards were distributed to employees in the plant before work started and were collected during the morning and the noon hour on that day. About 5 minutes before quitting time of the same day, foremen distributed to Hobart's employees a card, prepared at his direction, containing two typewritten questions:

> "Do you wish a union to bargain for your rate of pay?
>
> "Or would you rather have things as they are now with wage increase when I can justify it and chance of extra later on?" (R. 91, 125, 126, Exhibit 3, page 27).

Hobart testified that he told the foremen and the timekeeper that it was unnecessary to sign the cards or to fill them out but that the men, if they so desired, were to indicate their wish and preference regarding the two propositions stated in the questions (R. 125).

Several of the employees testified that their respective foremen told them that they need not sign the cards. The employees were directed by their foremen to place the cards in a box provided therefor (R. 88, 95, 100, 113).

According to Hobart's testimony, the reason for distributing the cards was to determine the wishes of his employees so that he could plan his future business course more accurately. When he was asked whether the cards

were circulated "with the idea of interfering with or discouraging the formation of a union", Hobart testified:

> "I don't think—there may have been a shade of it but not enough to feel—it was largely for my own information. Not the formation of a union however."

He stated further that, "I have to advertise each week to secure business and I had accounts payable in considerable quantity to pay for and to maintain things and my own morale and condition, I felt I should know the condition of the wishes of the employees" (R. 126).

Of approximately one hundred and thirty-one cards distributed, thirty-eight were not returned. Ninety-three were returned marked, and forty-three of these were signed (R. 125).

Paul Cruikshank, an employee (R. 107), alleged in his testimony that on February 16, 1940, foreman Jesse Arthur in a conversation told him that if Hobart found out "who started the union, he was going to lay them off, or fire them". Arthur also stated that Hobart could not afford to pay a $1.00 or $1.25 an hour as wages. Foreman Arthur testified (R. 115, 116) that he did not recall whether he spoke to Cruikshank on February 16, then admitted that he "probably" did speak to him on that day. Respecting the subject matter of the conversation, Arthur denied telling Cruikshank that if Hobart found out who belonged to the union, "he'd fire them or lay them off" (R. 114). As to whether he made the statement about Hobart's not being able to pay $1.00 or $1.25 an hour, Arthur testified that he said to Cruikshank, "I don't think that he (Hobart) could probably pay that much" (R. 115, 116, 117).

A few days following the distribution of the cards (Exhibit 3, R. 27), foreman Arthur asked employee Beecher Carey, according to the latter's testimony, whether he had "received a card to join the union". When Carey replied in the negative, Arthur said, "Well, they can join if they want to, but I don't think it is going to do them any good."

During the same conversation with Carey, he stated that Hobart did not have to run the shop and that if wages were raised to a dollar or a dollar and a quarter an hour, Hobart couldn't do it and he would close the shop (R. 92).

Employee Dale Yenger testified (R. 100, 101, 102) that in or about the middle of February, foreman Roy Brown asked him whether he wanted "collective bargaining on his wages". Yenger said "No," but expressed a desire for a wage increase of at least 10¢ more per hour. Brown then wrote it down, went to the factory office, returned about 20 minutes later and told Yenger that "his offer was 33¢ an hour."

Yenger "imagined" that "his" referred to Hobart, but there is no positive evidence to this effect. Yenger was then receiving 43¢ per hour. A week before Yenger's conversation with Brown he (Yenger) had received a wage increase of 3¢ per hour. Brown did not testify.

On or about February 20, Hobart received a telegram at Miami, Florida, from Troy, Ohio, notifying him that a charge had been filed "with the Labor Board in Cleveland." He immediately wired a denial and returned to Troy, arriving on February 21st. Around noontime of that day, he posted on the factory bulletin board the following notice:

> "It has come to my attention that the questions asked you about a week ago were construed by some to mean that I was interfering with your rights for collective bargaining.
>
> "It was not my intention at that time nor is it now to interfere with anyone's rights.
>
> "You will remember that in my personal interview, I stated to each of you very definitely that I did not want to say a word against your organizing.
>
> "If any of you have misinterpreted the meaning of my card with the questions, I wish to correct this erroneous impression.
>
> (Signed) CHARLES C. HOBART."

(Exhibit 2, R. 29, 30.) The bulletin board where the notice was posted was the customary place for posting of notices and was in the washroom at the Hobart plant where all the men stopped at one time or another. This notice remained upon the bulletin board for several days (R. 128, 132, 133). Hobart testified that he inquired about the notice a day or two after it was posted and it was still up (R. 132).

For the Court's convenience, the testimony of foreman Jesse Arthur referred to in the above statement of facts and in the opinion of the court below is hereto attached as "Appendix."

Jurisdiction.

The date of the decree sought to be reviewed herein was rendered June 5, 1941 (R. 143). Date of the order denying a rehearing was entered June 25, 1941 (R. 153). The jurisdiction of this Court is invoked under the provisions of Judicial Code, Sections 239 and 240, as amended, U. S. C. A., Title 28, Sections 346 and 347, and the National Labor Relations Act, 49 Stat. 449, Sec. 10(e).

Opinion Below.

The order of the Circuit Court of Appeals was entered on May 8, 1941, and appears at page 143 of the Record. The decree was entered on June 5, 1941, and appears at page 144 of the Record. The order denying the petition for rehearing was entered June 25, 1941, and appears at page 153 of the Record.

Questions Presented.

The questions presented are inherent in the reasons relied upon for the granting of the petition as next hereinafter stated, and will not be duplicated.

Reasons for Granting Petition.

Petitioner earnestly contends and respectfully submits that the Writ of Certiorari should be granted to review the

decision of said Circuit Court of Appeals for the Sixth Circuit, for the following reasons:

First. The Circuit Court of Appeals for the Sixth Circuit erred in affirming the finding of the National Labor Relations Board that there is substantial evidence that petitioner has been guilty of unfair labor practices defined by Section 8 (1 and 2) of the Act, 29 U. S. C. A., Section 158 (1 and 2) and interference with the exercise by its employees of their right of self organization guaranteed by Section 7 of the Act, 29 U. S. C. A., Section 157.

Second. The Circuit Court of Appeals for the Sixth Circuit erred in affirming the finding of the National Labor Relations Board that petitioner is guilty of unfair labor practice under the Act (29 U. S. C. A. 157, 158), because of petitioner's responsibility for statements of a minor supervisory employee, regarding the formation of a union in petitioner's plant because the undisputed evidence shows that—

(a) The statements were made without authorization by the petitioner and without his knowledge.

(b) The minor supervisory employee who made the statements had no power or authority to determine the policy of petitioner regarding unions or unionization, nor to hire or discharge other employees.

(c) The statements made by said minor supervisory employee did not reflect petitioner's attitude toward unionization in that petitioner had adopted a "hands off" policy and had specifically advised his employees that they could "do as they pleased" about the formation of a union in petitioner's plant.

Third. The Circuit Court of Appeals for the Sixth Circuit erred in its application of the law to the facts in this case in that—

(a) The court found that the following authorities are applicable and sustain the court's ruling and decree against petitioner.

H. J. Heinz Company v. *N. L. R. B.*, 61 S. Ct. 320, 311 U. S. 514, 85 L. Ed. 303;

Consumer's Power Company v. *N. L. R. B.*, 113 F. (2d) 38;

Atlas Underwear Company v. *N. L. R. B.*, 116 F. (2d) 1020 (C. C. A. 6);

N. L. R. B. v. *Asheville Hosiery Company*, 108 F. (2d) 288 (C. C. A. 4).

(b) The court erred in refusing to find that the following authorities are applicable herein and justify a finding and order in favor of the petitioner.

E. I. DuPont DeNemours & Co. v. *N. L. R. B.*, U. S. Court of Appeals, Fourth Circuit, 1940, 116 F. (2d) 388. Petition of N. L. R. B. for writ of certiorari denied May 5, 1941. 61 S. Ct. 959;

N. L. R. B. v. *Sparks-Withington Company, et al.*, U. S. Court of Appeals, Sixth Circuit. Decided April 16, 1941. 119 F. (2d) 72;

Martel Mills Corp. v. *N. L. R. B.*, 4th Circuit, 1940, 114 F. (2d) 624, 633, 634;

N. L. R. B. v. *Mathieson Alkali Works*, 114 F. (2d) 796, at 799, 802, 803;

N. L. R. B. v. *Sands Mfg. Co.*, 306 U. S. 332, 59 S. Ct. 508;

N. L. R. B. v. *Whittier Mills Co.*, 5 Cir., 111 F. (2d) 474, 479.

Petitioner is cognizant that a finding by the National Labor Relations Board is conclusive if supported by substantial evidence and that neither a Circuit Court of Appeals nor this Honorable Court may weigh the evidence nor determine the credibility of the witnesses. It is the

contention of the petitioner, however, that the undisputed facts in the transcript of the record, filed herewith, bring this case within the established rule that isolated speeches made or individual opinions expressed by underlings, though having some authority, in casual conversation with fellow employees, which speeches are not authorized or encouraged or even known to the management, ought not to be imputed to the employer as breaches of the law; that the personal zealousness and individual bias against a union, evidenced by statements of one of petitioner's foremen, a minor supervisory employee, should not bind the petitioner, where such statements were made without his knowledge nor authority and did not reflect his policy toward unionization.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said court to certify and send to the Supreme Court of the United States for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings in the said Circuit Court of Appeals in this cause; that the said decree of the said Circuit Court of Appeals in the said cause may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

CHARLES C. HOBART, *Doing Business as the Hobart Cabinet Company,*

By L. H. SHIPMAN,
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BAIRD BROOMHALL,
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